

# Agenda

## Supreme Court's Advisory Committee on the Rules of Professional Conduct

November 18, 2019

5:00 to 7:00 p.m.

Administrative Office of the Courts  
Scott M. Matheson Courthouse  
450 South State Street  
Salt Lake City  
Judicial Council Room, Suite N31

Welcome and approval of minutes	Tab 1	Simon Cantarero, Chair
Rule 6.5: Review of Subcommittee proposal	Tab 2	Cristie Roach (subcommittee chair), Phil Lowry, Vanessa Ramos, Padma Veeru-Collings, and Katherine Venti
Rule 8.4 and 14-301: Review Standard 3 and accompanying comment for internal consistency; discuss the use of "Rules" versus "Standards"	Tab 3	Adam Bondy (Chair), Steve Johnson, Dan Brough, Cristie Roach, Alyson McAllister
Rule 5.4: Report from Subcommittee	Tab 4	Cory Talbot (Chair), Judge Gardner, Simon Cantarero, Gary Sackett, Tim Conde, and Steve Johnson
Other business		Simón Cantarero, Chair

### 2020 Meeting Schedule:

January 20

February 17 (will need to move due to court holiday)

March 16

April 20

May 18

June 15

July 20 (will likely cancel)

August 17

September 21

October 19

November 16

Tab 1

**MINUTES OF THE SUPREME COURT'S  
ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT**

September 16, 2019

The meeting commenced at 5:03 p.m.

**Committee Members Attending:**

Daniel Brough (via telephone)  
Simón Cantarero, Chair  
Tim Conde (via telephone)  
Hon. James Gardner  
Steven G. Johnson (emeritus)  
Joni Jones  
Hon. Trent Nelson (emeritus) (via telephone)  
Amy Oliver  
Vanessa Ramos  
Austin Riter  
Cristie Roach  
Gary Sackett (emeritus)  
Cory Talbot  
Katherine Venti  
Billy Walker  
Hon. Mike Edwards

**Guests:**

Chief Justice Durrant

**Members Excused:**

Adam Bondy  
Phillip Lowry  
Allison McAllister  
Padma Veeru-Collings

**Staff:**

Nancy Sylvester

**Recording Secretary:**

Jurhee Rice

**Committee Webpage: <http://www.utcourts.gov/committees/RulesPC/>**

## **I. Welcome and Approval of Minutes**

Mr. Cantarero determined quorum and welcomed the committee.

### **Motion:**

*Ms. Roach moved to approve the minutes from the August 17 meeting. Ms. Jones seconded the motion. The motion passed unanimously.*

## **II. Welcome, Discussion of recently approved Report on Regulatory Reform, and expectations for the advisory committee**

Chief Justice Durrant thanked the committee for their efforts and time and welcomed the new members. He then addressed the Report on Regulatory Reform. Chief Justice Durrant said the Supreme Court has adopted the recommendations of the study committee and they are in the process of forming a task force that will make further recommendations.

The timeframe for the regulatory task force recommendations and the impact on this committee was discussed. Mr. Johnson stated that it may be a year or more before any task force gives any recommendations. It is believed that the task force may have an incidental impact on the committee. Committee chair, Mr. Cantarero, discussed the potential expansion of the scope of LPPs beyond the current plan. Chief Justice Durrant stated that the Court will take that up when there is a recommendation from the LPP Committee.

## **III. Rule 6.5: Review of Bar Commission recommendations and Subcommittee Proposal**

Rule 6.5 subcommittee, chaired by Ms. Roach, provided a brief backdrop of Rule 6.5. The subcommittee discussed the proposed changes and said it agrees that the proposed change to Rule 6.5 as presented by the Utah State Bar Innovation in Law Rules Committee is appropriate. The subcommittee reviewed the RPC consistency and Public Record Checklist to make sure that the proposed changes are consistent and recommended adding a comment regarding how this rule is different than the ABA model rule. The subcommittee will discuss paragraph (a) and come up with alternative wording regarding short term limited legal services and consent.

## **IV. Rule 8.4 and 14-301: Report from Subcommittee**

The subcommittee discussed the split on which standards from Rule 14-301 should be included in Rule 8.4. The committee discussed the problem with excluding particular rules while discounting others. The subcommittee recommends that court personnel and venue be added but with specificity (such as a listing of services and/or places) so that “venue” is defined and limited to those places where legal services are being provided with a specific purpose. The committee recommended that all standards be included in the rule. Mr. Sackett recommended that the Standards be called the Rules of Professionalism and Civility if they are truly no longer aspirational. Following a unanimous vote to recommend the rules to the Court, committee chair, Mr. Cantarero, said he will take the committee’s recommendations to the Court’s next meeting.

**V. Rule 5.4 (informed consent versus disclosure)**

The Rule 5.4 subcommittee discussed the topic of informed consent versus disclosure in instances of a non-lawyer owning a law firm. The subcommittee recommended written notice. The members thought informed consent went too far and was unnecessary. The committee then discussed timing of the rule and how it relates to regulatory reform. Mr. Johnson stated the rule requires public comment so implementation would not be for a minimum of three months. The committee expressed concern about having these rules in effect without guardrails separate from the regulatory sandbox. The Rule 5.4 subcommittee, chaired by Cory Talbot, will review 1.0 and the definition of the practice of law. Committee chair, Mr. Cantarero, said he will present these concerns to the Court pending the subcommittee's review and revised report.

**VI. Other business**

No other business

**VII. Scheduling of Future Meetings**

October 21, 2019 at 5:00 p.m.  
November 18, 2019 at 5:00 p.m.

**VIII. Adjournment**

The meeting adjourned at 7:03 p.m.

# Tab 2

# Tab 3

1 | **Rule 14-301. ~~Standards~~Rules of Professionalism and Civility.**

2 | **Preamble**

3 | A lawyer's conduct should be characterized at all times by personal courtesy and professional  
4 | integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers,  
5 | we must be mindful of our obligations to the administration of justice, which is a truth-seeking process  
6 | designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must  
7 | remain committed to the rule of law as the foundation for a just and peaceful society.

8 | Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the  
9 | fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay  
10 | and often to deny justice.

11 | Lawyers should exhibit courtesy, candor and cooperation in dealing with the public and participating  
12 | in the legal system. The following ~~standards~~rules are designed to encourage lawyers to meet their  
13 | obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of  
14 | civility and professionalism, both of which are hallmarks of a learned profession dedicated to public  
15 | service.

16 | Lawyers should educate themselves on the potential impact of using digital communications and  
17 | social media, including the possibility that communications intended to be private may be republished or  
18 | misused. Lawyers should understand that digital communications in some circumstances may have a  
19 | widespread and lasting impact on their clients, themselves, other lawyers, and the judicial system.

20 | We expect judges and lawyers will make mutual and firm commitments to these ~~standards~~rules.  
21 | Adherence is expected as part of a commitment by all participants to improve the administration of justice  
22 | throughout this State. We further expect lawyers to educate their clients regarding these ~~standards~~rules  
23 | and judges to reinforce this whenever clients are present in the courtroom by making it clear that such  
24 | tactics may hurt the client's case.

25 | Although for ease of usage the term "court" is used throughout, these ~~standards~~rules should be  
26 | followed by all judges and lawyers in all interactions with each other and in any proceedings in this State.  
27 | Copies may be made available to clients to reinforce our obligation to maintain and foster these  
28 | ~~standards~~rules. Nothing in these ~~standards~~rules supersedes or detracts from existing disciplinary codes  
29 | or standards of conduct.

30 | *Cross-References: R. Prof. Cond. Preamble [1], [13]; R. Civ. P. 1; R. Civ. P. 65B(b)(5); R. Crim. P.*  
31 | *1(b); R. Juv. P. 1(b); R. Third District Court 10-1-306; Fed. R. Civ. P. 1; DUCivR 83-1.1(g).*

32 | 1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that  
33 | clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat  
34 | all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and  
35 | dignified manner.

36 | **Comment:** Lawyers should maintain the dignity and decorum of judicial and administrative  
37 | proceedings, as well as the esteem of the legal profession. Respect for the court includes lawyers' dress



38 and conduct. When appearing in court, lawyers should dress professionally, use appropriate language,  
39 and maintain a professional demeanor. In addition, lawyers should advise clients and witnesses about  
40 proper courtroom decorum, including proper dress and language, and should, to the best of their ability,  
41 prevent clients and witnesses from creating distractions or disruption in the courtroom.

42 The need for dignity and professionalism extends beyond the courtroom. Lawyers are expected to  
43 refrain from inappropriate language, maliciousness, or insulting behavior in depositions, meetings with  
44 opposing counsel and clients, telephone calls, email, and other exchanges. They should use their best  
45 efforts to instruct their clients and witnesses to do the same.

46 *Cross-References: R. Prof. Cond. 1.4; R. Prof. Cond. 1.16(a)(1); R. Prof. Cond. 2.1; R. Prof. Cond.*  
47 *3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond. 3.5(d); R. Prof. Cond.*  
48 *3.8; R. Prof. Cond. 3.9; R. Prof. Cond. 4.1(a); R. Prof. Cond. 4.4(a); R. Prof. Cond. 8.4(d); R. Civ. P.*  
49 *10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).*

50 2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are  
51 tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers  
52 abuse anyone or engage in any offensive or improper conduct.

53 *Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 1.2(a); R. Prof. Cond. 1.2(d); R. Prof.*  
54 *Cond. 1.4(a)(5).*

55 3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court  
56 improper motives, purpose, or conduct. Neither written submissions nor oral presentations should  
57 disparage the integrity, intelligence, morals, ethics, or personal behavior of any such person unless such  
58 matters are directly relevant under controlling substantive law.

59 ~~Lawyers should shall avoid hostile, demeaning, or humiliating, or discriminatory conduct words in~~  
60 ~~written and oral communications with all other counsel, parties, judges, witnesses, and other participants~~  
61 ~~in all proceedingsadversaries. Neither written submissions nor oral presentations should disparage the~~  
62 ~~integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are~~  
63 ~~directly relevant under controlling substantive law. Discriminatory conduct includes all expressions of~~  
64 ~~discrimination against protected classes as enumerated in the Utah Antidiscrimination Act of 1965, Utah~~  
65 ~~Code section 34A-5-106(1)(a), and federal statutes, as amended from time to time.~~

66 **Comment:** Lawyers should refrain from expressing scorn, superiority, or disrespect. Legal process  
67 should not be issued merely to annoy, humiliate, intimidate, or harass. Special care should be taken to  
68 protect witnesses, especially those who are disabled or under the age of 18, from harassment or undue  
69 contention. Lawyers should refrain from acting upon or manifesting bigotry, discrimination, or prejudice  
70 toward any participant in the legal process, even if a client requests it.

71 ~~Hostile, demeaning, and humiliating communications include all expressions of discrimination on the~~  
72 ~~basis of race, religion, gender, sexual orientation, age, handicap, veteran status, or national origin, or~~  
73 ~~casting aspersions on physical traits or appearance. Lawyers should refrain from acting upon or~~

74 ~~manifesting bigotry, discrimination, or prejudice toward any participant in the legal process, even if a client~~  
75 ~~requests it.~~

76 ~~Lawyers should refrain from expressing scorn, superiority, or disrespect. Legal process should not be~~  
77 ~~issued merely to annoy, humiliate, intimidate, or harass. Special care should be taken to protect~~  
78 ~~witnesses, especially those who are disabled or under the age of 18, from harassment or undue~~  
79 ~~contention.~~

80 *Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 3.1; R. Prof. Cond. 3.5; R. Prof. Cond.*  
81 *8.4; R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).*

82 4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not  
83 taken or seek to create such an unjustified inference or otherwise seek to create a “record” that has not  
84 occurred.

85 *Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.5(a); R. Prof. Cond.*  
86 *8.4(c); R. Prof. Cond. 8.4(d).*

87 5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of  
88 another lawyer for any improper purpose.

89 *Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d);*  
90 *R. Civ. P. 11(c); R. Civ. P. 16(d); R. Civ. P. 37(a); Fed. R. Civ. P. 11(c)(2).*

91 6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all  
92 commitments reasonably implied by the circumstances or by local custom.

93 *Cross-References: R. Prof. Cond. 1.1; R. Prof. Cond. 1.3; R. Prof. Cond. 1.4(a), (b); R. Prof. Cond.*  
94 *1.6(a); R. Prof. Cond. 1.9; R. Prof. Cond. 1.13(a), (b); R. Prof. Cond. 1.14; R. Prof. Cond. 1.15; R. Prof.*  
95 *Cond. 1.16(d); R. Prof. Cond. 1.18(b), (c); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.3; R.*  
96 *Prof. Cond. 3.4(c); R. Prof. Cond. 3.8; R. Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.3(a), (b); R.*  
97 *Prof. Cond. 8.4(c); R. Prof. Cond. 8.4(d).*

98 7. When committing oral understandings to writing, lawyers shall do so accurately and completely.  
99 They shall provide other counsel a copy for review, and never include substantive matters upon which  
100 there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers  
101 shall bring to the attention of other counsel changes from prior drafts.

102 **Comment:** When providing other counsel with a copy of any negotiated document for review, a  
103 lawyer should not make changes to the written document in a manner calculated to cause the opposing  
104 party or counsel to overlook or fail to appreciate the changes. Changes should be clearly and accurately  
105 identified in the draft or otherwise explicitly brought to the attention of other counsel. Lawyers should be  
106 sensitive to, and accommodating of, other lawyers’ inability to make full use of technology and should  
107 provide hard copy drafts when requested and a redline copy, if available.

108 *Cross-References: R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond. 8.4(c); R. Prof. Cond.*  
109 *8.4(d); R. App. P. 11(f).*

110 8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately  
111 and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to  
112 other counsel and attempt to reconcile any differences before the proposed orders and any objections are  
113 presented to the court.

114 *Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 8.4; R. Civ. P. 7(f); R. Third District Court 10-1-*  
115 *306(6).*

116 9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery,  
117 delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of  
118 settlement or inform opposing counsel that a response has not been authorized by the client.

119 *Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(a); R. Prof. Cond. 4.1(a); R. Prof. Cond.*  
120 *8.4(c); R. Prof. Cond. 8.4(d).*

121 10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters,  
122 particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not  
123 doing so.

124 *Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4(d); R. Prof. Cond.*  
125 *8.4(d); R. Third District Court 10-1-306 (1)(A); Fed. R. Civ. P. 16(2)(C).*

126 11. Lawyers shall avoid impermissible ex parte communications.

127 *Cross-References: R. Prof. Cond. 1.2; R. Prof. Cond. 2.2; R. Prof. Cond. 2.9; R. Prof. Cond. 3.5; R.*  
128 *Prof. Cond. 5.1; R. Prof. Cond. 5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d); R. Civ. P. 77(b); R. Juv.*  
129 *P. 2.9(A); Fed. R. Civ. P. 77(b).*

130 12. Lawyers shall not send the court or its staff correspondence between counsel, unless such  
131 correspondence is relevant to an issue currently pending before the court and the proper evidentiary  
132 foundations are met or as such correspondence is specifically invited by the court.

133 *Cross-References: R. Prof. Cond. 3.5(a); R. Prof. Cond. 3.5(b); R. Prof. Cond. 5.1; R. Prof. Cond.*  
134 *5.3; R. Prof. Cond. 8.4(a); R. Prof. Cond. 8.4(d).*

135 13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated  
136 to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or  
137 in a manner intended to take advantage of another lawyer's unavailability.

138 *Cross-References: R. Prof. Cond. 8.4(c); R. Juv. P. 19.*

139 14. Lawyers shall advise their clients that they reserve the right to determine whether to grant  
140 accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing  
141 the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts.  
142 Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities  
143 when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an  
144 extension of time solely for the purpose of delay or to obtain a tactical advantage.

145 **Comment:** Lawyers should not evade communication with other counsel, should promptly  
146 acknowledge receipt of any communication, and should respond as soon as reasonably possible.

147 Lawyers should only use data-transmission technologies as an efficient means of communication and not  
148 to obtain an unfair tactical advantage. Lawyers should be willing to grant accommodations where the use  
149 of technology is concerned, including honoring reasonable requests to retransmit materials or to provide  
150 hard copies.

151 Lawyers should not request inappropriate extensions of time or serve papers at times or places  
152 calculated to embarrass or take advantage of an adversary.

153 *Cross-References: R. Prof. Cond. 1.2(a); R. Prof. Cond. 2.1; R. Prof. Cond. 3.2; R. Prof. Cond. 8.4;*  
154 *R. Juv. P. 54.*

155 15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and  
156 conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling  
157 change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify  
158 other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall  
159 cooperate in making any reasonable adjustments.

160 **Comment:** When scheduling and attending depositions, hearings, or conferences, lawyers should be  
161 respectful and considerate of clients' and adversaries' time, schedules, and commitments to others. This  
162 includes arriving punctually for scheduled appointments. Lawyers should arrive sufficiently in advance of  
163 trials, hearings, meetings, depositions, and other scheduled events to be prepared to commence on time.  
164 Lawyers should also advise clients and witnesses concerning the need to be punctual and prepared.  
165 Lawyers who will be late for a scheduled appointment or are aware that another participant will be late,  
166 should notify the court, if applicable, and all other participants as soon as possible.

167 *Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 5.1; R. Prof. Cond. 8.4(a);*  
168 *R. Juv. P. 20; R. Juv. P. 20A.*

169 16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is  
170 known, unless their clients' legitimate rights could be adversely affected.

171 *Cross-References: R. Prof. Cond. 8.4; R. Civ. P. 55(a); Fed. R. Civ. P. 55(b)(2).*

172 17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an  
173 opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert  
174 a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected  
175 information.

176 *Cross-References: R. Prof. Cond. 3.1; R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 4.1; R.*  
177 *Prof. Cond. 4.4(a); R. Prof. Cond. 8.4; R. Civ. P. 26(b)(1); R. Civ. P. 26(b)(8)(A); R. Civ. P. 37(a)(1)(A),*  
178 *(D); R. Civ. P. 37(c); R. Crim. P. 16(b); R. Crim. P. 16(c); R. Crim. P. 16(d); R. Crim. P. 16(e); R. Juv. P.*  
179 *20; R. Juv. P. 20A; R. Juv. P. 27(b); Fed. R. Civ. P. 26(b)(1); Fed. R. Civ. P. 26(g)(1)(B)(ii), (iii).*

180 18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions  
181 unless reasonably intended to preserve an objection or protect a privilege for resolution by the court.  
182 "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences,  
183 lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

184           *Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.3(a)(1); R. Prof. Cond. 3.4; R. Prof. Cond.*  
185 *3.5; R. Prof. Cond. 8.4; R. Civ. P. 30(c)(2); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 30(c)(2); Fed. R.*  
186 *Civ. P. 30(d)(2); Fed. R. Civ. P. 30(d)(3)(A).*

187           19. In responding to document requests and interrogatories, lawyers shall not interpret them in an  
188 artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or  
189 information, nor shall they produce documents in a manner designed to obscure their source, create  
190 confusion, or hide the existence of particular documents.

191           *Cross-References: R. Prof. Cond. 3.2; R. Prof. Cond. 3.4; R. Prof. Cond. 8.4; R. Prof. Cond. 3.4; R.*  
192 *Civ. P. 26(b)(1); R. Civ. P. 37; R. Crim. P. 16(a); R. Juv. P. 20; R. Juv. P. 20A; Fed. R. Civ. P. 37(a)(4).*

193           20. Lawyers shall not authorize or encourage their clients or anyone under their direction or  
194 supervision to engage in conduct proscribed by these ~~Standards~~Rules.

195

196           Adopted by Supreme Court order October 16, 2003.

197

198

1       **Rule 8.4. Misconduct.**

2       It is professional misconduct for a lawyer to:

3       (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another  
4 to do so, or do so through the acts of another;

5       (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as  
6 a lawyer in other respects;

7       (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

8       (d) engage in conduct that is prejudicial to the administration of justice;

9       (e) state or imply an ability to influence improperly a government agency or official or to achieve  
10 results by means that violate the Rules of Professional Conduct or other law; ~~or~~

11       (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial  
12 conduct or other law;

13       (g) engage in conduct that is an unlawful, discriminatory, or retaliatory employment practice under  
14 Title VII of the Civil Rights Act of 1964 or the Utah Antidiscrimination Act, except that for the purposes of  
15 this paragraph and in applying those statutes, "employer" shall mean any person or entity that employs  
16 one or more persons; or

17       (h) egregiously violate, or engage in a pattern of repeated violations of the [Standards] [Rules] of  
18 Professionalism and Civility in Rule 14-301 if such violations harm the lawyer's client or another lawyer's  
19 client or are prejudicial to the administration of justice.

20       Comment

21       [1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional  
22 Conduct or knowingly assist or induce another to do so through the acts of another, as when they request  
23 or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer  
24 from advising a client concerning action the client is legally entitled to take.

25       [1a] An act of professional misconduct under Rule 8.4(b), (c), (d), (e), (f), (g), or (h) cannot be counted  
26 as a separate violation of Rule 8.4(a) for the purpose of determining sanctions. Conduct that violates  
27 other Rules of Professional Conduct, however, may be a violation of Rule 8.4(a) for the purpose of  
28 determining sanctions.

29       [2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses  
30 involving fraud and the offense of willful failure to file an income tax return. However, some kinds of  
31 offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving  
32 "moral turpitude." That concept can be construed to include offenses concerning some matters of  
33 personal morality, such as adultery and comparable offenses, that have no specific connection to fitness  
34 for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer  
35 should be professionally answerable only for offenses that indicate lack of those characteristics relevant  
36 to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the

37 administration of justice are in that category. A pattern of repeated offenses, even ones of minor  
38 significance when considered separately, can indicate indifference to legal obligation.

39 [3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias  
40 or prejudice based upon race; color; sex; pregnancy, childbirth, or pregnancy-related conditions; age, if  
41 the individual is 40 years of age or older; religion; national origin; disability, age, sexual orientation; or  
42 genetic information socioeconomic status, ~~may violate~~ violates paragraph (d) when such actions are  
43 prejudicial to the administration of justice. The protected classes listed in this comment are consistent with  
44 those enumerated in the Utah Antidiscrimination Act of 1965, Utah Code Sec. 34A-5-106(1)(a) (2016),  
45 and in federal statutes and is not meant to be an exhaustive list as the statutes may be amended from  
46 time to time. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial  
47 judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone  
48 establish a violation of this rule.

49 ~~[3a] The Standards of Professionalism and Civility approved by the Utah Supreme Court are intended~~  
50 ~~to improve the administration of justice. An egregious violation or a pattern of repeated violations of the~~  
51 ~~Standards of Professionalism and Civility may support a finding that the lawyer has violated paragraph~~  
52 ~~(d).~~

53 [4] The substantive law of antidiscrimination and anti-harassment statutes and case law governs the  
54 application of paragraph (g), except that for purposes of determining a violation of paragraph (g), the size  
55 of a law firm or number of employees is not a defense. Paragraph (g) does not limit the ability of a lawyer  
56 to accept, decline, or, in accordance with Rule 1.16, withdraw from a representation, nor does paragraph  
57 (g) preclude legitimate advice or advocacy consistent with these rules. Discrimination or harassment  
58 does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to  
59 allege or prove a violation of paragraph (g). Lawyers may discuss the benefits and challenges of diversity  
60 and inclusion without violating paragraph (g). Unless otherwise prohibited by law, implementing or  
61 declining to implement initiatives aimed at recruiting, hiring, retaining, and advancing employees of  
62 diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student  
63 organizations, are not violations of paragraph (g).

64 [5] Paragraphs (g) and (h) do not apply to expression or conduct protected by the First Amendment to  
65 the United States Constitution or by Article I of the Utah Constitution.

66 [6] A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's  
67 practice or by limiting the lawyer's practice to members of underserved populations in accordance with  
68 these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a  
69 representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule  
70 6.1 to provide legal services to those who are unable to pay and their obligation under Rule 6.2 not to  
71 avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b), and (c). A lawyer's  
72 representation of a client does not constitute an endorsement by the lawyer of the client's views or  
73 activities. See Rule 1.2(b).

74 | ~~[7]~~[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that  
75 | no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity,  
76 | scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

77 | ~~[8]~~ ~~[5]~~ Lawyers holding public office assume legal responsibilities going beyond those of other  
78 | citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers.  
79 | The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian,  
80 | agent and officer, director or manager of a corporation or other organization.

81 | [9] This rule differs from ABA Model Rule 8.4 to the extent that it changes paragraph (g), adds new  
82 | paragraph (h), and modifies the comments accordingly.

83



**Rule 8.4(h) and 14-301, Standard No. 3 Subcommittee Recommendations**

**Nancy's Comments added from September meeting and post-meeting review**

Rule 8.4(h)

The committee was split on which Standards from 14-301 should be included in the rule. All subcommittee members agreed that Standards 1, 3, 4, 5, 6, and 7 should be included. Two of five agreed that Standard 18 should be included. Three of five agreed that Standards 9, 11, 13, 15, 17, and 19 should be included. Four of five agreed that Standard 8 should be included.

The only time that Rule 8.4(h) comes into play is when a lawyer really misbehaves or does so repeatedly (“egregiously violate, or engage in a pattern of repeated violations . . . if such violations harm the lawyer’s client or another lawyer’s client or are prejudicial to the administration of justice”). An isolated technical violation of the Standards is not misconduct under 8.4(h). Consequently, there is no harm in listing as many possible varieties of misbehavior as possible. If we don’t list certain Standards in 8.4(h), lawyers may believe that they may openly violate those Standards.

Subcommittee recommendation:

8.4(h) [It is professional misconduct for a lawyer to] egregiously violate, or engage in a pattern of repeated violations, of [Standards 1, 3, 4, 5, 6, 7, 8, 9, 11, 13, 15, 17, 18, or 19 of] the Standards of Professionalism and Civility in Rule 14-301 if such violations harm the lawyer’s client or another lawyer’s client or are prejudicial to the administration of justice.]

Rule 8.4 Comments

Subcommittee recommendation for Comment 3 (the same as the Committee discussed after receiving public comments):

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct bias or prejudice based upon race, color, sex, pregnancy, childbirth or pregnancy-related conditions, age, if the individual is 40 years of age or older, religion, national origin, disability, sexual orientation, or genetic information, may violate paragraph (d) when such actions are prejudicial to the administration of justice. The protected classes listed in this Comment are consistent with those enumerated in the Utah Antidiscrimination Act of 1965, Utah Code Sec, 34A-5-106(1)(a) (2016) and in federal statutes, and is not meant to be an exhaustive list, as the statutes may be amended from time to time. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Subcommittee recommendations for Comment 4 (the same as the Committee discussed after receiving public comments and Supreme Court comments):

[4] The substantive law of antidiscrimination and anti-harassment statutes and case law **guides governs** the application of paragraph (g), except that for purposes of determining a violation of paragraph (g), the size of a law firm or number of employees is not a defense.

**Comment [NS1]:** The committee recommends that none of the standards be listed since violations of the standards can occur in groups.

The way the red proposal is written, it looks like an attorney would get a free pass on violating the other non-listed standards or that someone can only get in trouble if they engage in a pattern of violating only one standard.

If they are no longer aspirational, perhaps the Standards should be called the Rules of Professionalism and Civility?

Paragraph (g) does not limit the ability of a lawyer to accept, decline, or in accordance with Rule 1.16, withdraw from a representation, nor does paragraph (g) preclude legitimate advice or advocacy consistent with these rules. Discrimination or harassment does not need to be previously proven by a judicial or administrative tribunal or fact-finder in order to allege or prove a violation of paragraph (g). Lawyers may ~~engage in conduct undertaken to~~ discuss the benefits and challenges of diversity and inclusion, ~~including any benefits and challenges,~~ without violating paragraph (g). Unless otherwise prohibited by law, implementing ~~Implementing or declining to implement~~ initiatives aimed at recruiting, hiring, retaining, and advancing employees of diverse backgrounds or from historically underrepresented groups, or sponsoring diverse law student organizations are not violations of paragraph (g).

Subcommittee recommendations for Comment 4a (the same as discussed in our last Committee meeting):

[4a] Paragraphs (g) and (h) do not apply to expression or conduct protected by the First Amendment to the United States Constitution or by Article I of the Utah Constitution.

**Comment [NS2]:** This should be numbered [5], not [4a].

Subcommittee recommendations for Standard 3 of Rule 14-301:

The subcommittee recommends that a few minor changes be made to paragraph 1 of the Standard. Because the “participant” language has been removed with the second sentence, it should be deleted from the third (and now, the new second) sentence so that it reads, “Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of any ~~such participant~~ person unless such matters are directly relevant under controlling substantive law.

The new second paragraph also needs some modifications. We recommend that “court personnel” be added to the list of people who are protected by the Standard, as there are several anecdotal stories of court clerks and other court personnel being abused by attorneys. In order to eliminate the question as to whether this Standard applies only to in-court actions, we eliminated “in all proceedings.” The subcommittee believes that the Standard should apply whenever lawyers are interacting with others. We recommend that the concept of “in any venue” (adapted from the GAL statutes at Cristie’s suggestion) be adopted so that the Standard applies in all situations and not just in court, including depositions, negotiations, arbitrations, mediations, and inter-office conduct.

It is felt that although there are statues regulating the employment situation, they only apply to firms with at least 15 employees. The Standard with this change applies to all law offices, irrespective of size.

**Question:** do we need to include this list of activities in the Standard, or should it be placed in a comment? Or do we just say “in any venue”?

We recommend that the “hostile, demeaning or humiliating” paragraph be separated from “discriminatory” paragraph.

With these changes, the Standard should read as follows (redlined changes are changes from our last committee meeting):

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of any ~~such participant person~~ unless such matters are directly relevant under controlling substantive law.

Lawyers shall avoid hostile, demeaning, or humiliating, conduct with all other counsel, parties, judges, court personnel, witnesses, and ~~other participants in all proceedings others in any~~ the course of the practice of law. ~~venue~~.

Discriminatory conduct includes all expressions of discrimination against protected classes as enumerated in the Utah Antidiscrimination Act of 1965, Utah Code Sec. 34A-5-106(1)(a), and federal statutes, as amended from time to time.

Comment: Hostile, demeaning, and humiliating communications include all expressions of discrimination on the basis of race; color; sex; pregnancy, childbirth, or pregnancy-related conditions; age, if the individual is 40 years of age or older; religion; national origin; disability; gender, sexual orientation gender identity; or genetic information. The protected classes listed in this Comment are consistent with those enumerated in the Utah Antidiscrimination Act of 1965, Utah Code Sec. 34A-5-106(1)(a) (2016), and in federal statutes, and is not meant to be an exhaustive list as the statutes may be amended from time to time.

Lawyers should refrain from expressing scorn, superiority, or disrespect. Legal process should not be issued merely to annoy, humiliate, intimidate, or harass. Special care should be taken to protect witnesses, especially those who are disabled or under the age of 18, from harassment or undue contention. Lawyers should refrain from acting upon or manifesting bigotry, discrimination, or prejudice toward any participant in the legal process, even if a client requests it.

Cross-References: R. Prof. Cond. Preamble [5]; R. Prof. Cond. 3.1; R. Prof. Cond. 3.5; R. Prof. Cond. 8.4; R. Civ. P. 10(h); R. Civ. P. 12(f); R. App. P. 24(k); R. Crim. P. 33(a); Fed. R. Civ. P. 12(f).

**Comment [NS3]:** The subcommittee needs to look at this again to make this internally consistent. I don't think this comment is necessary and I believe the committee may have voted to take it out at its September meeting because it would be redundant to what's in the rule/standard itself.

# Tab 4

1 **Rule 5.4. Professional Independence of a Lawyer**

2 ~~(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:~~ may provide  
3 legal services pursuant to sections (b), (c), or (d) of this Rule only if there is [at all times] no  
4 interference with the lawyer's:

5 ~~(a)(1) professional independence of judgment, an agreement by a lawyer with the lawyer's~~  
6 ~~firm, partner or associate may provide for the payment of money, over a reasonable~~  
7 ~~period of time after the lawyer's death, to the lawyer's estate or to one or more specified~~  
8 ~~persons;~~

9 ~~(a)(2)(i) a lawyer who purchases the practice of a deceased, disabled or disappeared~~  
10 ~~lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other~~  
11 ~~representative of that lawyer the agreed-upon purchase price; and~~

12 ~~(a)(2)(ii) a lawyer who undertakes to complete unfinished legal business of a deceased~~  
13 ~~lawyer may pay to the estate of the deceased lawyer that proportion of the total~~  
14 ~~compensation which fairly represents the services rendered by the deceased lawyer; and~~

15 (2) duty of loyalty to a client, and

16 ~~(a)(3) protection of client confidences a lawyer or law firm may include nonlawyer~~  
17 ~~employees in a compensation or retirement plan, even though the plan is based in whole~~  
18 ~~or in part on a profit sharing arrangement.~~

19 ~~(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the~~  
20 ~~partnership consist of the practice of law.~~ may permit a person to recommend, employ, or pay the  
21 lawyer to render legal services for another.

22 ~~(c) A lawyer or law firm may share legal fees with a nonlawyer.~~ shall not permit a person who  
23 recommends, employs or pays the lawyer to render legal services for another to direct or regulate  
24 the lawyer's professional judgment in rendering such legal services.

25 ~~(d) A lawyer shall not practice law in an organization in which a financial interest is held or~~  
26 ~~managerial authority is exercised by a one or more persons who are nonlawyers, provided that~~  
27 ~~the lawyer shall not practice with or in the form of a professional corporation or association~~  
28 ~~authorized to practice law for a profit, if:~~

29 ~~(d)(1) before accepting a representation, provide written notice to a prospective client that~~  
30 ~~one or more nonlawyers holds a financial interest in the organization in which the lawyer~~  
31 ~~practices or that one or more nonlawyers exercises managerial authority over the lawyer;~~  
32 ~~and a nonlawyer owns any interest therein, except that a fiduciary representative of the~~  
33 ~~estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time~~  
34 ~~during administration;~~

35 ~~(d)(2) set forth in writing to a client the financial and managerial structure of the~~  
36 ~~organization in which the lawyer practices.~~ a nonlawyer is a corporate director or officer

37 ~~thereof or occupies the position of similar responsibility in any form of association other~~  
38 ~~than a corporation; or~~

39 ~~(d)(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.~~

40 ~~(e) A lawyer may practice in a non-profit corporation which is established to serve the public~~  
41 ~~interest provided that the nonlawyer directors and officers of such corporation do not interfere~~  
42 ~~with the independent professional judgment of the lawyer.~~

43

#### 44 **Comments**

45 [1] ~~The provisions of this Rule express traditional limitations on sharing fees. These limitations~~  
46 ~~are to protect the lawyer's professional independence of judgment, to assure that the lawyer is~~  
47 ~~loyal to the needs of the client, and to protect clients from the disclosure of their confidential~~  
48 ~~information. Where someone other than the client pays the lawyer's fee or salary, manages the~~  
49 ~~lawyer's work, or recommends employment of the lawyer, that arrangement does not modify the~~  
50 ~~lawyer's obligation to the client. As stated in paragraph (ea), such arrangements should not~~  
51 ~~interfere with the lawyer's professional judgment.~~

52 ~~[2] The Rule also expresses traditional limitations on permitting a third party to direct or regulate~~  
53 ~~the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f)~~  
54 ~~(lawyer may accept compensation from a third party as long as there is no interference with the~~  
55 ~~lawyer's independent professional judgment and the client gives informed consent). This Rule~~  
56 ~~does not lessen a lawyer's obligation to adhere to the Rules of Professional Conduct and does not~~  
57 ~~authorize a nonlawyer to practice law by virtue of partnering with a lawyer .~~

58 ~~[2] Whether in accepting referrals, fee sharing, or working in a firm where nonlawyers own an~~  
59 ~~interest in the firm or otherwise manage the firm, the lawyer must make certain that the~~  
60 ~~professional core values of protecting the lawyer's professional judgment, ensuring the lawyer's~~  
61 ~~loyalty to the client, and protecting client confidences are not compromised in any way. It may~~  
62 ~~be impossible for a lawyer to work in a firm where a nonlawyer owner or manager has a duty to~~  
63 ~~disclose client information to third parties, as the lawyer's duty to maintain client confidences~~  
64 ~~would be compromised.~~

65 ~~[2a] Paragraph (a)(4) of the ABA Model Rule was not adopted because it is inconsistent with the~~  
66 ~~provisions of Rule 7.2(b), which prohibit the sharing of attorney's fees. Rule 5.4(e) addresses a~~  
67 ~~lawyer practicing in a non-profit corporation that serves the public interest. There is no similar~~  
68 ~~provision in the ABA Model Rules.~~

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**1 Rule 5.4. Professional Independence of a Lawyer**

2 (a) A lawyer may provide legal services pursuant to sections (b), (c), or (d) of this Rule only if  
3 there is [at all times] no interference with the lawyer's:

4 (1) professional independence of judgment,

5 (2) duty of loyalty to a client, and

6 (3) protection of client confidences.

7 (b) A lawyer may permit a person to recommend, employ, or pay the lawyer to render legal  
8 services for another.

9 (c) A lawyer or law firm may share legal fees with a nonlawyer.

10 (d) A lawyer may practice law in an organization in which a financial interest is held or  
11 managerial authority is exercised by a one or more persons who are nonlawyers, provided that  
12 the lawyer shall:

13 (1) before accepting a representation, provide written notice to a prospective client that  
14 one or more nonlawyers holds a financial interest in the organization in which the lawyer  
15 practices or that one or more nonlawyers exercises managerial authority over the lawyer;  
16 and

17 (2) set forth in writing to a client the financial and managerial structure of the  
18 organization in which the lawyer practices.

**19 Comments**

20 [1] The provisions of this Rule are to protect the lawyer's professional independence of  
21 judgment, to assure that the lawyer is loyal to the needs of the client, and to protect clients from  
22 the disclosure of their confidential information. Where someone other than the client pays the  
23 lawyer's fee or salary, manages the lawyer's work, or recommends employment of the lawyer,  
24 that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (a),  
25 such arrangements should not interfere with the lawyer's professional judgment. *See also* Rule  
26 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference  
27 with the lawyer's independent professional judgment and the client gives informed consent).  
28 This Rule does not lessen a lawyer's obligation to adhere to the Rules of Professional Conduct  
29 and does not authorize a nonlawyer to practice law by virtue of partnering with a lawyer .

30 [2] Whether in accepting referrals, fee sharing, or working in a firm where nonlawyers own an  
31 interest in the firm or otherwise manage the firm, the lawyer must make certain that the  
32 professional core values of protecting the lawyer's professional judgment, ensuring the lawyer's  
33 loyalty to the client, and protecting client confidences are not compromised in any way. It may  
34 be impossible for a lawyer to work in a firm where a nonlawyer owner or manager has a duty to  
35 disclose client information to third parties, as the lawyer's duty to maintain client confidences  
36 would be compromised.

